

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Appeal from Order No.371 of 2007.**

1. Mr.Arvind Manohar Utagikar
2. Mrs. Savita Arvind Utagikar
both residing at 112/4, Erandwane,
Pirtuamruti, Pune 411 004.
3. Mr.Subhash Laxman Pimpalaskar,
res. at Flat No.4, A Building,
Sushila Apartments, Karve Road,
Pune 411 004.
4. Mr. Sameer Gajanan Hardikar,
res. at 8/221, Nandadeep,
Roopnagar, Bandra (East),
Mumbai 400 051

Through their Power of Attorney Holders

1) Ranoji Baban Pokale

2) Mahadeo Namdeo Pokale

both residing at Dhairi,
Tal : Haveli, Dist: Pune

..Petitioners
(Original Plaintiffs)

versus

1. M/s. Swapnashilpa Developers,
a partnership firm registered
under Indian Partnership Act,
having its registered office at
C/o. Samruddhi Developers,
Garmal, Dhaireswar Apartments,
Dhairi, Pune 411 041
through its partners
2. Mr. Harshal Rajendra Gaikwad,
res. at 22, Ganeshnagar,
Dhairi, Pune 411 041.
3. Mr. Ghanshyam Bhaskar Bhavar,
res. at Garmal Dhairi,
Pune 411 041.
4. Mr. Amol Arjun Kenjale,
res. at 22, Ganeshnagar,

Dhairi, Pune 411 041.

5. Mr. Sandeep Pandharinath Chavan,
res. at 136/1, Vadgaon Khurd,
Opp. Sanas High School,
Dhairi Phata, Pune 411 011.

..Respondents
(Original Defendants)

Mr.S.M.Kelkar and Mandr Limaye for the Appellant

Mr.Ramdas P. Sabban for the respondent No.1

Coram : S.R.Sathe, J.
Dated : 1st November, 2007

JUDGMENT.

1. Appellants, the original plaintiffs in Special Civil Suit No .1082 of 2006 have preferred this Appeal against Order passed by the Civil Judge, Senior Division, Pune below Exhibit 5, whereby plaintiffs application for temporary injunction restraining defendants from carrying out any construction in the suit property i.e. Survey Nos.11/3B/7 admeasuring 5 gunthas, Survey No.11/3B/8 admeasuring 5 gunthas, Survey No.11/3B/9 admeasuring 5 gunthas situated at Village Dhairi, Taluka Haveli, and restraining defendants from creating any third party interest in the suit property till disposal of the suit was rejected. For the sake of convenience, hereafter the parties shall be referred to as plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under:

. The above mentioned three lands were purchased by plaintiff Nos.1 and 2 and 3 and 4 respectively under three different registered sale deeds sometime in the year 2005-2006. According to plaintiffs the land bearing Survey No.11 Hissa No.3B of Village Dhairi was totally admeasuring about 58 gunthas. Out of the said land three plots totally admeasuring about 12.25 gunthas were purchased by Mr. Zingade, Mr. Bhavsar and Mr & Mrs. Khamiskar on 8.1.1993, 3.5.1993 and 20.5.1993 respectfully. Zingade and Bhavsar purchased 5 gunthas land each while Khamiskar purchased 2.25 gunthas land. After they purchased the said property, they handed over the said land to the defendant No.1 Swapnashilpa Developers for development. It is alleged that while executing the development agreement the said purchasers of the land deliberately gave false description and in particular the boundaries, with a view to grab the land of the plaintiffs and to carry out the development on plaintiffs lands as the same were having frontage. The Developer then started

construction in the plaintiffs land. When plaintiffs came to know about the same, they filed regular Civil Suit No.315 of 2006 for declaration and injunction restraining the defendants from carrying out any construction in the suit lands. The plaintiffs also submitted an application for temporary injunction. However, during the course of said interim application it transpired that the Survey No. of the lands purchased by the plaintiffs was not correctly mentioned in their sale deeds. According to plaintiffs they had purchased lands out of Survey No. 11/3B, but through mistake in their sale deed the survey number was mentioned as 1/3B. The plaintiffs therefore got executed the rectification deed and on the basis of the same also got the revenue record corrected. In spite of the same the learned trial Judge, while disposing of the application for temporary injunction in Suit No.315 of 2006 observed that the plaintiffs have failed to prove that the defendants have made an encroachment on plaintiffs land and carried out the construction. Naturally, the temporary injunction application was dismissed by the trial court. Being aggrieved by the said Order plaintiffs filed Misc. Civil Appeal. However, the same was also dismissed by the District

Court. Hence, plaintiffs withdrew the Suit No.315 of 2006 unconditionally and thereafter again filed the present suit.

3. In the instant suit plaintiffs alleged that the defendants have deliberately made an encroachment on their lands and carried out the construction. The plaintiffs, therefore, prayed that the defendants be directed to remove the encroachment and hand over the possession of the suit land to the plaintiffs. The plaintiffs also submitted an application Exhibit 5 and prayed that during the pendency of the suit the defendants be restrained from carrying out any construction in the suit property and create any third party interest in respect of the suit property.

4. The said application was strongly opposed by the defendants. They firstly contended that the plaintiffs earlier suit where similar injunction was sought, the same was rejected by the trial court. The appeal preferred by the plaintiffs against the said decision was also dismissed. The plaintiffs had also not sought permission while withdrawing the suit. The defendants therefore contended that

plaintiffs are not entitled to file the present suit for same subject matter and the same is liable to be dismissed.

5. The defendants also contended that they have purchased land out of survey No.11/3 and there is in fact no such land bearing No. 11/3B. The defendants contended that there is no such alleged sub division of the land and merely because plaintiffs have got rectified the deed executed from their vendors, it cannot be said that plaintiffs have proved that the defendants have made an encroachment in plaintiffs land.

6. The defendants also contended that it was necessary for plaintiffs to get the land measured and to produce the map drawn by the competent authority to show the alleged encroachment. As, such map is not produced, the suit is not maintainable in view of the provisions of Order VII Rule 3 of the Code of Civil procedure. The defendant further contended that they have not made any encroachment and carried out the construction. Not only that, but they have also contended that they have carried out construction in their land and

created third party interest in favour of the different purchasers by entering into necessary agreements. They, therefore contended that the balance of convenience is not in favour of plaintiffs and if temporary injunction as prayed is granted, then, not only defendants, but even the prospective purchasers of the flats would also suffer irreparable loss. Hence, on all these grounds the defendants prayed for dismissal of the application.

7. After hearing the arguments of both the learned advocates and considering the material placed by both the sides, the learned trial Judge came to the conclusion that plaintiffs have failed to show prima facie that the defendants have made an encroachment in plaintiffs land and balance of convenience is also not in favour of plaintiffs. Naturally, he rejected the plaintiffs application.

8. The above mentioned order is challenged by the plaintiffs in the present appeal. In this appeal before me Shri S.M. Kelkar, advocate for the appellants- original plaintiffs has urged only two points. Firstly, he submitted that the land

purchased by the plaintiffs and the land purchased by Zingade, Bhavsar and Khamiskar were totally different. However, while executing development agreement with defendant No.1, false and incorrect boundaries were mentioned, and by giving the boundaries of plaintiffs property the defendants tried to show that the defendants are the owners of the said property. He, therefore, submitted that the defendants have in fact no right, title and interest in respect of the suit property and as such when they have carried out the construction in the said property it must be held that the defendants have made an encroachment in plaintiffs property. Secondly, he canvassed before me that once the plaintiffs have got the rectification deed executed in their favour, the learned trial Judge ought to have held that the plaintiffs have shown that the defendants are carrying out construction in the land bearing Survey No.11/3B/7, 11/3B/8 and 11/3B/9. Lastly, he submitted that if the defendants are not restrained from carrying out further construction and or create third party interest in the suit property, there would be irreparable loss to the plaintiffs. He, therefore, submitted that the appeal be allowed and the order passed by the

learned Trial Judge be set aside. As against this, Shri Sabbam, learned Advocate for the defendants supported the order passed by the learned trial judge.

9. It is an admitted fact that plaintiffs had earlier filed suit No.315 of 2006 wherein also plaintiffs had claimed temporary injunction in respect of the property which is described in the present suit. Admittedly, the said prayer of the plaintiffs was rejected by the trial court as well as by the First Appellate Court. When such is the position, the plaintiffs are in fact not entitled to file the present temporary injunction application particularly when plaintiffs have not shown that the cause of action for the present application is different. So, plaintiffs present application for temporary injunction was rightly rejected by the learned trial Judge.

10. It is the case of the plaintiffs that they have purchased land bearing Survey No.11/3B/7, 11/3B/8 and 11/3B/9 of Village Dhairi. However, admittedly, their initial sale deeds were not in respect of the land bearing Survey No.11/3B, but the

same were in respect of the lands bearing Survey No. 1/3B etc. Merely because subsequently the vendors have executed rectification deed and stated that the land was wrongly described as Survey No.1/3B/7, 1/3B/8 and 1/3b/9, and it ought to have been described as Survey No.11/3B/7, 11/3B/8 and 11/3B/9 it cannot be said that the plaintiffs have in fact sufficiently proved that they have actually purchased the land bearing Survey No.11/3B/7. It is pertinent to note that the plaintiffs have not produced any record to show that their vendors were infact the owners of the land bearing Survey No.11/3B/7, 11/3B/8 and 11/3B/9. The plaintiffs have neither produced the conveyance deed of their vendors nor they have produced any extract of mutation entry showing the names of their vendors for the lands bearing Survey No.11/3B/7, 11/3B/8 and 11/3B/9. Besides, this even if we assume for the sake of argument that the plaintiffs have purchased the lands bearing Survey No.11/3B/7, 11/3B/8 and 11/3B/9, still then that by itself is again not sufficient to prove the plaintiffs present case of alleged encroachment. It was incumbent on the plaintiffs to make an application to the competent authority fore measurement of plots and to place on

record that the land in question where the defendants have carried out the construction is in fact part and parcel of the land bearing Survey No.11/3b/7, 11/3B/8 and 11/3B/9. However, without making any such proper effort to get the land measured from the DILR, the plaintiffs have hurriedly filed the earlier suit as well as the present suit. It is needless to say that in a case where the plaintiff has claimed the possession of the encroached portion, he has to prove the exact encroachment and for that purpose get the respective lands measured from the competent authority and to adduce authentic material on record to show that the land where the alleged encroachment has been made is in fact having a particular number and is actually purchased by the plaintiffs. If such evidence or material is lacking then prima facie it cannot be said that the plaintiff has shown either his title or possession in respect of the suit land.

11. In the instant case, what is more to be noted is that the alleged lands of the plaintiffs and defendants are not adjacent to each other, but are in fact in totally opposite direction. So, when such is the position it was more necessary for the

plaintiffs to adduce some authentic evidence which would have prima facie shown that the defendants have made an encroachment. On the contrary, we find that the plaintiffs were not even vigilant in getting the Survey Number of their lands verified. The plaintiff has produced along with plaint the rough sketch showing the plaintiffs property as well as the defendants property. The plaintiffs property is situated on the northern side, then on the eastern side there are certain lands and thereafter there is land of the defendant as alleged by the plaintiffs. If such is the position, then it is very difficult to believe that the defendant would dare to go to a totally different land which is not at all even adjacent and carry out construction at the said place and incur the risk in that behalf. So, prima facie there is no substance in the allegations made by the plaintiffs.

12. It must be noted that plaintiffs have produced one map drawn by the Cadastral Surveyor during the pendency of the suit. However, if we carefully see the said map then we find that in that map also survey number is described as Survey No.11 Hissa No.3. There is no such survey number as

11/3B/7, 11/3B/8 and 11/3B/9. So, this also infact supports the version of the defendants that there are in fact no such lands or sub division having number 11/3B. According to the defendants, the land is only divided in Survey No.3, Survey No.4 etc. The map produced by the plaintiffs infact supports the contention of the defendants. So, having regard to all these facts and circumstances, I have no hesitation to hold that the learned trial Judge has rightly held that the plaintiffs have failed to make out any prima facie case.

13. Turning to the question of balance of convenience it must be noted that admittedly, the defendants have carried out the structure on the suit property. The defendants have contended that they have entered into agreement with different flat purchasers. So, if temporary injunction as prayed is granted at this stage then certainly the defendants would suffer irreparable loss. They would not get return of their investment and the huge amount spent for the construction. Besides this, the purchasers who have entered into agreement with the defendants would also be put to great hardship and inconvenience. So, the balance of

convenience is also not in favour of the plaintiffs.

14. From the perusal of the order passed by the learned trial Judge, it is very clear that there is nothing on record to show that the Order passed by the learned Trial Judge is arbitrary or capricious or the same is not borne out from the material on record. Hence, there is no necessity to interfere with the said Order in the present appeal. The appeal is dismissed with costs.

(S.R.Sathe, J.)